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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS ERICH GORDON,

Defendant and Appellant.

D075375

(Super. Ct. No. RIF1506242)

APPEAL from a judgment of the Superior Court of Riverside County, Steven G. Counelis, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Marcus Erich Gordon appeals from a judgment entered after a jury convicted him of possession of methamphetamine for sale (Health & Saf. Code, § 11378).¹ On appeal, Gordon argues that the trial court abused its discretion in denying his postconviction motion for disclosure of peace officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. Gordon sought the requested records to support a motion for a new trial in which he argued that his appointed trial counsel was constitutionally ineffective because he did not file a pretrial *Pitchess* motion.

The trial court denied Gordon's postconviction *Pitchess* motion and declined to conduct an in camera review of the requested personnel records after concluding that the discovery was not material to Gordon's motion for a new trial. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

On September 30, 2015, Riverside County Deputy Sheriff Brandon Frank went to the residence of a probationer in the City of Perris to conduct a probation search. It is undisputed that, as Deputy Frank approached the residence, he observed Gordon seated on a couch in the garage of the residence holding a bag that contained four ounces (slightly more than an "eight ball," i.e., an eighth of an ounce) of methamphetamine. It is also undisputed that Deputy Frank observed two additional bags in the garage that each contained seven grams (roughly a quarter ounce) of methamphetamine, though the precise location of those bags was the subject of conflicting trial testimony, as discussed

¹ All further statutory references are to the Health and Safety Code unless otherwise noted.

post. Deputy Frank arrested Gordon and recovered the methamphetamine from the garage, as well as drug paraphernalia from Gordon's pants pocket and a pocket scale from a vehicle that Gordon had driven and parked outside the residence. The district attorney filed an information charging Gordon with possession of methamphetamine for sale.

Prior to trial, the prosecution filed a motion in limine indicating that Gordon had lodged "formal accusations" against Deputy Frank regarding the arrest and investigation. It was later disclosed that the "formal accusations" discussed in the motion in limine were set forth in a citizen's complaint that Gordon had filed with the police department, which resulted in an internal investigation and a departmental finding that Deputy Frank had engaged in no wrongdoing. In the motion in limine, the prosecution asked the trial court to admonish Gordon not to inquire at trial into Deputy Frank's personnel records or records from the department's internal investigation, given that Gordon had not filed a *Pitchess* motion requesting discovery on those topics. Gordon's appointed trial counsel did not oppose the prosecution's request and advised the court that he did not "have a good faith belief that there [was] a valid *Pitchess* motion available to [Gordon]." The court granted the motion in limine and admonished Gordon accordingly.

At trial, Deputy Frank testified that he saw Gordon holding all three of the bags of methamphetamine that were recovered from the garage. He testified that he recovered the pocket scale from the vehicle that Gordon had driven to the residence. Deputy Frank also testified that an eight ball, which is roughly equivalent to the smallest bag of methamphetamine recovered from the garage, is not a common amount to buy or sell for personal use.

Riverside County Deputy Sheriff Steven Leone, the prosecution's drug expert, testified that a dose of methamphetamine is usually one-tenth of a gram and that a methamphetamine high lasts from 10 to 12 hours. He testified that methamphetamine is commonly sold to users at a weight of two-tenths of a gram. Deputy Leone further testified that some sellers, known as user-dealers, buy larger quantities of methamphetamine for both personal use and resale purposes. According to Deputy Leone, the methamphetamine bags that were recovered from the garage were larger than a single user would generally possess, and each one was packaged in an amount commonly associated with resale. When questioned regarding the significance of the pocket scale that Deputy Frank had recovered, Deputy Leone testified that a scale is a common indicium of drug sales.

Gordon's defense at trial was that the methamphetamine that he allegedly possessed was for personal use, not for resale. Gordon conceded that he was holding the smallest of the three bags of methamphetamine (the eight ball) in his lap when Deputy Frank arrived, but testified that it was for his own personal use only. He testified that the other two bags of methamphetamine were located on a nearby table at the time of his arrest and that they belonged to a female companion who was also present at the probationer's residence during the arrest. Gordon further testified that the digital scale that Deputy Frank recovered from the vehicle did not belong to him. Gordon testified that he assumed that the scale belonged to his female companion, with whom he had driven in that vehicle earlier in the day.

The jury found Gordon guilty of possession of methamphetamine for sale. Further, the trial court found true allegations that Gordon had suffered one prior strike (Pen. Code, §§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)) and one prison prior (*id.*, § 667.5, subd. (b)).² Before sentencing, Gordon advised the court that he intended to file a motion for a new trial on grounds of ineffective assistance of counsel. Due to Gordon's forthcoming motion, the court declared a conflict and relieved Gordon's appointed trial counsel. The court also granted Gordon's request that he be permitted to represent himself under *Faretta v. California* (1975) 422 U.S. 806.

Proceeding in propria persona, Gordon filed a postconviction *Pitchess* motion seeking in camera review and production of discovery to support his forthcoming motion for a new trial. Gordon stated that he intended to argue ineffective assistance of counsel in his motion for a new trial based on his counsel's failure to file a pretrial *Pitchess* motion. According to Gordon, a pretrial *Pitchess* motion would have resulted in the disclosure of peace officer personnel records and witness interview records from the police department's internal investigation of Deputy Frank, which the defense could have

² The trial court also found true allegations that Gordon had suffered three prior drug-related convictions under section 11370.2, former subdivision (c), which provided for three-year sentence enhancements for a number of prior drug-related convictions. However, on October 11, 2017, the Governor signed Senate Bill No. 180, which amended section 11370.2, former subdivision (c), and removed certain offenses from the list of qualifying convictions giving rise to sentencing enhancements under that statute, including the prior convictions that Gordon suffered. (Stats. 2017, ch. 677, § 1.) The trial court found that this legislative amendment applied retroactively and declined to impose sentencing enhancements for Gordon's prior drug-related convictions.

used to corroborate Gordon's testimony and establish that Deputy Frank had a propensity for dishonesty.³

In his postconviction *Pitchess* motion, Gordon identified several instances of alleged falsehoods in Deputy Frank's police report and preliminary hearing testimony. Most notably, Gordon claimed that Deputy Frank had falsely testified that Gordon had physically possessed all three methamphetamine bags at the time of the arrest, when in reality, only one bag was on his lap, and the other two bags were located on a nearby table. Further, Gordon argued that Deputy Frank's police report intentionally omitted facts that would have tended to show that the other two bags of methamphetamine belonged to Gordon's female companion, namely, the fact that she had used a pseudonym to identify herself to Deputy Frank and had disclosed to Deputy Frank that she was residing in the probationer's garage.

The court denied Gordon's postconviction *Pitchess* motion and declined to conduct an in camera review of the requested discovery. The court found that Gordon had not satisfied the materiality requirement necessary to warrant *Pitchess* discovery because he had not made a showing of a "specific factual scenario" establishing a "plausible factual foundation" of police misconduct. In particular, the court denied the motion because Gordon had conceded that he had physically possessed one bag of methamphetamine and constructively possessed the other two bags of methamphetamine that were on a nearby

³ Specifically, Gordon's postconviction *Pitchess* motion sought any complaints filed against Deputy Frank alleging dishonesty, perjury, and fabrication of evidence, reasonable suspicion, or probable cause, as well as the contact information of individuals who filed and/or were interviewed by the police department regarding such complaints.

table. The trial court concluded that Gordon's defense was thus "consistent with the arresting deputy's trial testimony."

Gordon filed his motion for a new trial shortly after the court ruled on his *Pitchess* motion, alleging that his appointed trial counsel had been ineffective because he had failed to file a pretrial *Pitchess* motion. The trial court denied the motion for a new trial and sentenced Gordon to an aggregate term of seven years in prison, calculated as follows: the upper term of three years for his conviction for possession of methamphetamine for sale, doubled to six years due to the prior strike, plus one year for the prison prior.

II

DISCUSSION

Gordon contends that the trial court erred in denying his postconviction *Pitchess* motion, which he claims was material to his motion for a new trial. He urges this court to conditionally reverse the judgment and remand with directions to the trial court to review the requested documents in chambers, order the production of relevant discovery, and grant him an opportunity to demonstrate that a new trial is warranted. On appeal, Gordon bears the burden of showing that the trial court abused its discretion in denying his postconviction *Pitchess* motion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226, 1228 (*Mooc*).)

A. *Legal Principles*

The Supreme Court's decision in *Pitchess* established that a criminal defendant may " 'compel discovery' of certain relevant information in the personnel files of police officers by making 'general allegations which establish some cause for discovery' of that information and by showing how it would support a defense to the charge against him." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019 (*Warrick*).) The Legislature later codified the *Pitchess* holding in Penal Code sections 832.7 and 832.8, and Evidence Code sections 1043 through 1045. (*Warrick*, at p. 1019.) In short, the *Pitchess* statutory "scheme entitles a defendant to information that will 'facilitate the ascertainment of the facts' at trial [citation], that is, 'all information pertinent to the defense.' " (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 14.)

Pitchess discovery under the statutory scheme proceeds in a two-step process. Under the first step, the defendant must file a written motion describing the type of records or information sought, supported by an affidavit showing "good cause" for the discovery or disclosure, setting forth the materiality of the discovery or disclosure to the "subject matter involved in the pending litigation," and stating upon reasonable belief that the government agency at issue has the records or information requested. (Evid. Code, § 1043, subds. (a) & (b); *Mooc, supra*, 26 Cal.4th at p. 1226.) Then, if the trial court finds good cause for the discovery, it conducts an in camera review of the pertinent documents to determine which, if any, are relevant. (Evid. Code, § 1045, subd. (b).) " 'Subject to statutory exceptions and limitations . . . the trial court should then disclose to

the defendant "such information [that] is relevant to the subject matter involved in the pending litigation." ' ' (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086.)

In the usual case, *Pitchess* motions are brought pretrial while defense counsel is preparing its defenses for trial. At this stage, a defendant need satisfy only a "relatively low" threshold to establish good cause. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83.) Nevertheless, a defendant is not entitled to an in camera review of peace officer personnel records without " 'establish[ing] a plausible factual foundation' " for the allegation of officer misconduct. (*Warrick, supra*, 35 Cal.4th at p. 1025.) The defendant "must present . . . a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Ibid.*) Corroborating collateral evidence is not required, nor is a defendant required to "present a *credible* or *believable* factual account of, or a motive for, police misconduct." (*Id.* at p. 1026.) Instead, all that is required is a showing that the alleged scenario "might or could have occurred." (*Ibid.*) "[D]epending on the circumstances of the case," a sufficient factual allegation in a *Pitchess* motion "may consist of a denial of the facts asserted in the police report." (*Id.* at pp. 1024-1025.)

Although most *Pitchess* motions are filed before trial, courts have permitted such motions to be brought after trial in connection with posttrial motions and habeas corpus proceedings. (*Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1068-1069 [habeas corpus proceeding]; *People v. Nguyen* (2007) 151 Cal.App.4th 1473, 1477-1479 (*Nguyen*) [motion for new trial]; *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1110-1115 (*Hurd*) [habeas corpus proceeding].) However, different and more stringent standards apply to postconviction *Pitchess* motions. In contrast to pretrial *Pitchess*

motions, the "pending litigation" to which the requested discovery must be material is no longer the criminal trial, but rather, the posttrial motion or habeas corpus proceeding itself. (*Nguyen*, at p. 1478; *Hurd*, at p. 1111.) Where, as here, the defendant seeks *Pitchess* discovery to support a posttrial motion on grounds of ineffective assistance of counsel, the standard is "whether a reasonable probability existed that disclosure of the requested records would have led to a different result at trial." (*Nguyen*, at p. 1478.)

B. Application

Before we address the propriety of the trial court's ruling denying *Pitchess* discovery, we must resolve a preliminary argument that the People raise, i.e., that Gordon's postconviction *Pitchess* motion no longer has "relevance." The People contend that Gordon's motion, and therefore the outcome of this appeal, is irrelevant because the trial court has already denied Gordon's motion for a new trial and there is no other pending motion or proceeding in which Gordon alleges that his appointed trial counsel was constitutionally ineffective. The People are incorrect.

At the time that Gordon filed his *Pitchess* motion, he intended to, and subsequently did, file a motion for a new trial based on ineffective assistance of counsel. If we were to conclude that the trial court should have reviewed the relevant peace officer personnel records, the appropriate disposition would be to conditionally reverse the judgment and remand with instructions to conduct an in camera review of the pertinent records, order disclosure of relevant records, and allow Gordon an opportunity to demonstrate prejudice. (*People v. Gaines* (2009) 46 Cal.4th 172, 180-181 ["[W]hen a trial court has failed to review the *Pitchess* documents at all, it is appropriate to remand

the case to permit the trial court to review the requested documents in chambers and to issue a discovery order, if warranted."].) If Gordon were to make such a showing, Gordon could (and likely would) file a renewed motion for a new trial on grounds of ineffective assistance of counsel. Thus, the trial court's denial of Gordon's motion for a new trial does not preclude this court from entertaining Gordon's appeal.

Turning to the merits, we conclude that the trial court did not abuse its discretion in denying Gordon's postconviction *Pitchess* motion under the standards announced in *Nguyen*. Even assuming the best case scenario for Gordon, i.e., that the personnel records and internal investigation records at issue would have shown that Deputy Frank had a propensity for dishonesty and that two of the methamphetamine bags recovered from the scene of the arrest belonged to Gordon's female companion, Gordon has not established a reasonable probability that such discovery would have led to a different outcome at trial.

In his postconviction *Pitchess* motion, Gordon argued that Deputy Frank's personnel records should be disclosed because Deputy Frank omitted certain facts from his report concerning Gordon's arrest, including that Gordon's female companion used a pseudonym, and that another person had been residing in the garage. According to Gordon, these omissions were material because the jury could have relied on the omitted facts to find that Gordon's companion was attempting to evade criminal liability and that either she or the probationer had exercised dominion over the contents of the garage, including the two bags of methamphetamine that were on the table. However, although Deputy Frank omitted these facts from his report, he affirmatively testified about both

facts during his trial testimony. In particular, he testified that Gordon's female companion had provided a pseudonym and that he believed that someone other than Gordon had been residing in the garage at issue. Presented with this testimony, the jury nevertheless convicted Gordon of the crime as charged.

Further, in both his trial testimony and his postconviction *Pitchess* motion, Gordon conceded that he owned and physically possessed one of the three bags of methamphetamine recovered from the scene of the arrest. Deputy Leone, whose veracity Gordon has not questioned, testified that a typical dose of methamphetamine is one-tenth of a gram and that a typical buyer purchases only two doses at a time for personal use—i.e., just one-twentieth the amount of the smallest bag of methamphetamine recovered from the garage. He further testified that the particular amount that Gordon possessed (roughly an eight ball) is a common amount used for resale purposes. In addition, Gordon testified that he had driven the same vehicle in which a pocket scale was located. Therefore, even without any testimony from Deputy Frank or any evidence indicating that Gordon possessed all three bags of methamphetamine, Gordon's own testimony, as well as that of Deputy Leone, was sufficient to establish that Gordon possessed a bag containing 20 times more methamphetamine than a user typically buys for personal use, and that he had driven a vehicle on the day of the arrest in which a scale (a common indicium of drug sales) was recovered.

On these facts, we cannot conclude that the trial court abused its discretion in denying Gordon's postconviction *Pitchess* motion.

III

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.